IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MILTON W. NOLAN, Plaintiff, vs. HYPERCOM MANUFACTURING RESOURCES, Defendant.	No. CIV 00-802-PHX-RCB **O R D E R**

Defendant's Motion for Summary Judgment (doc. #5) is pending before the court. The court heard oral argument on the motion on November 6, 2000, at which time the matter was taken under advisement. Having carefully considered the issues involved, the court now rules.

BACKGROUND

For the purposes of this motion, at least, the parties largely agree on the facts. Plaintiff Milton W. Nolan has brought suit under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. (FMLA) challenging certain actions by his former employer, Hypercom Manufacturing Resources ("Hypercom"). Nolan was employed by Hypercom as a manufacturing engineer,

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beginning in July 1997. On November 30, 1998, Nolan began a medical leave of absence. At the time he departed on his medical leave, Hypercom did not inform him that it would consider that leave as taken under FMLA. By letter dated January 4, 1999, which Nolan received January 8, 1999, Hypercom announced its intention to treat Nolan's absence as medical leave under FMLA, retroactive to November 30, 1998. Nolan Aff. (doc. #10), Ex. A.

On March 10, 1999, Nolan informed Hypercom that he anticipated returning to work on March 27, 1999. Nolan Aff., Ex. C (e-mail dated March 10, 1999, from Kathy Ladrigan to John Murphy and six other persons). This information was disseminated among Hypercom's human resources personnel. Id.

On March 25, 1999, Nolan visited his employer and brought a note from his treating physician, stating that he could return to work. Nolan Aff., Ex. B (note dated March 25, 1999, signed by Michael A. Steingard, D.O.).[1] During the visit, Nolan told Hypercom that he was ready at that time to return to work. Nolan Aff. ¶ 6. Hypercom's human resources personnel conferred and Nolan was told to report to work on April 5, 1999. Id. ¶¶ 7-8. On April 5, 1999, when Nolan reported to work as requested, he was informed that his position had been eliminated due to departmental restructuring. Murphy Aff. ¶ 4. Nolan received no earlier notice of the restructuring. Nolan Aff. ¶ 9. The

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[1] Defendant's copy of the note is different in two significant respects: first, the words "on 4/5/99" have been scrawled on the note, and an adhesive note, purporting to describe Nolan's statement about the doctor's note, is appended. See DSOF, Ex. 2. The adhesive note is undated, initialed by an unidentified person, and is hearsay outside any exception. For these reasons, it is not competent evidence.

effective date of Nolan's termination is unknown. On May 2, 2000, Nolan filed suit, alleging that Hypercom violated FMLA when it refused to allow him to resume his job after a period of medical leave.

Hypercom's summary judgment motion turns on whether Nolan timely returned to work. FMLA provides for twelve weeks of protected medical leave. Whether Nolan exceeded the FMLA-protected leave period depends on whether Hypercom's retroactive designation of medical leave as FMLA leave is valid. If Nolan's FMLA leave began on November 30, 1998, Nolan exceeded the statutory leave period by six weeks when he returned to work April 5, 1999. If the court disallows the retroactive designation, Hypercom calculates the leave period to have expired on March 29, 1999. Hypercom argues that summary judgment is still appropriate, on the grounds that Nolan did not return to work until April 5, 1999. Either way, Hypercom asserts that it is entitled to judgment as a matter of law.

In response, Nolan contends that Hypercom cannot retroactively designate medical leave as FMLA leave, citing a regulation promulgated by the Department of Labor. He argues that the FMLA period started running January 8, 1999, and ended on April 2, 1999. He contends his return on March 25, 1999 was timely. Nolan attributes the lapse of time between his expression of readiness to return and the date he reported back to work as due to the direct instructions of Hypercom that he should return on April 5, 1999. In Nolan's view, the date of his readiness to return to work and whether it falls within the 12-week period constitute material issues disputed by the parties.

In reply, Hypercom contends that Nolan received the 12-week leave guaranteed to him by FMLA, regardless of when he was notified of the FMLA designation, and he is entitled to nothing further. "Since Plaintiff received all the benefits afforded to him under the Act, his FMLA claim is ripe for summary adjudication." Reply at 2. While stating that it "does not know who wrote the April 5 return to work date on the disputed doctor's note," Reply at 4, Hypercom contends that the court can "simply disregard this disputed evidence," as it can supply another document from Dr. Steingard, Nolan's treating physician. This document, a form "Attending Physician's statement" dated March 23, 1999, states Dr. Steingard's opinion that Plaintiff could return to work on April 5, 1999. See Supp. SOF, Ex. B (Gabriel Aff.), Ex. 1 (form).

DISCUSSION

In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. Id. at 248. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating

a genuine issue for trial. See id. at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. See, e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987).

A. Requirement of timely FMLA notification

The FMLA is designed to address "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods. . . ." 29 U.S.C. § 2601(a)(4). In pertinent part, the statute provides that employers must allow their employees to take up to twelve weeks medical leave. 29 U.S.C. § 2612(a)(1). An eligible employee who takes leave under section 2612 is entitled to be restored to the position of employment he held when the leave began, or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. 29 U.S.C. § 2614(a)(1). Restoration may lawfully be denied only if: (A) denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; (B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; or (C) in any case in which the employee elects not to return after receiving a FMLA notice. 29 U.S.C. § 2614(b).

Congress directed the Secretary of Labor to "prescribe such regulations as are necessary" to carry out the statute's substantive provisions. 29 U.S.C. § 2654. The regulation in issue here requires employers to notify employees promptly that

the paid medical leave on which they are embarking will be considered taken pursuant to FMLA. 29 C.F.R. § 825.208[2]; see also id. § 825.700(a) (applying notice requirement to unpaid leave). Retroactive designation of leave is not permitted. See id. § 825.208(c). The regulation requires twelve weeks of leave to run from the date of notice, regardless of how much time off the employee has had prior to notification.

Defendant, conceding that its FMLA notice was neither timely nor solely prospective, contends that this court should side with those judges who find that the regulation improperly expands the rights of employees guaranteed by FMLA. The Eighth and Eleventh Circuits have aligned with this position, as well as a number of district courts. In such cases, the regulation has been invalidated. Plaintiff, on the other hand, urges the court to

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[2] In pertinent part, the regulation reads:

> (b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. . . .
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> (c) . . . If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 C.F.R. § 825.208.

follow the precedents of the Fourth and Sixth Circuits and a comparable constellation of district courts. The opinions in these cases uphold the regulation, finding it within the ambit of discretion conferred on the agency to interpret the FMLA statute. The parties agree that no court in the Ninth Circuit has yet broached the issue. Neither attempts to predict how the Ninth Circuit might approach the issue, but rather presents the conflicting authorities as if asking for a judicial coin flip.

Regulations promulgated pursuant to statutory delegation are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v., Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778 (1984). Chevron sets forth the test for the judiciary to determine whether an agency has construed a statute permissibly. First, a reviewing court must establish whether the statute is clear; if so, the clear intent must be given effect, and the issue of deference does not arise. 467 U.S. at 842-43; 104 S.Ct. at 2781; Earth Island Institute v. Mosbacher, 929 F.2d 1449, 1452 (9th Cir. 1991). If Congress has not directly addressed the precise question at issue, however, the agency's reasonable interpretation must be upheld. Chevron, 467 U.S. at 844; 104 S.Ct. at 2782; Redmond-Issaquah R.R. Preservation Ass'n v. Surface Trans. Board, 223 F.3d 1057, 1061 (9th Cir. 2000).

Those circuit courts that have invalidated the Department of Labor regulation hold that the proscription of retroactive designation is both "contrary to clear congressional intent" and "manifestly contrary to the statute." See McGregor v. Autozone, Inc., 180 F.3d 1305, 1308 (11th Cir. 1999); Ragsdale v. Wolverine

Worldwide Inc., 218 F.3d 933, 939 (8th Cir. 2000), petition for cert. filed September 5, 2000 (No. 00-6029).

In McGregor, the Eleventh Circuit characterized the notice regulation as "convert[ing] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave." McGregor, 180 F.3d at 1308.[3] By contrast, the panel understood the statute, providing for "a total of 12 weeks of leave," to mean that an employee is federally entitled to only twelve weeks of leave. Id. The panel found support for this conclusion by noting the statute's failure to link "explicit notice" of FMLA designation to "significant consequences." This omission was found to suggest a legislative intent not to penalize employers for failing to give prospective notice. See id. The court also referred to the statute's purpose "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers." Id. (quoting 29 U.S.C. § 2601(b)(3)). On this reading of the statute, an employee's absence beyond twelve weeks is not protected by FMLA. Id. The panel found the regulation requiring twelve weeks of leave running from the date of notification to be

[3] The facts concerned a plaintiff who contended that she was entitled to 13 weeks of paid disability leave followed by 12 weeks of unpaid FMLA leave when her employer did not notify her prospectively that the leaves would run concurrently. Her employer demoted her on her return after 15 weeks of absence. The district court granted summary judgment for the employer on the grounds that the plaintiff was not entitled to FMLA protections after more than 12 weeks on leave.

contrary to the statute. Id.

The Eighth Circuit's holding in Ragsdale is more explicit: "twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." 218 F.3d at 937.[4] The panel found that the statute posits a complementary relationship between FMLA leave and employer-provided paid leave, so that neither the employee nor the employer would be disadvantaged:

> The provision enables the employee to take advantage of paid employer-provided leave that the employee would be entitled to regardless of the existence of the FMLA. The provision also protects the employer; if an employee requests FMLA leave, the employer can require that the employee also use employer-provided leave thereby, if providing at least twelve weeks of leave, saving itself from having to extend more leave than provided for in its leave policy. The DOL has failed to appreciate and differentiate those circumstances when notice should be required from employers in order to protect employees' substantive FMLA rights from those situations where notice is not necessary to protect FMLA rights.

Id. at 938. The regulations requiring prospective designation of FMLA leave upset the balance negotiated by Congress by "creat[ing] rights which the statute does not clearly confer," id. at 939, and accordingly were invalidated.

The Second Circuit has indicated that it would waive compliance with the notice regulation as long as an employee receives the substantive benefits FMLA confers. See Sarno v.

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[4] In Ragsdale, the plaintiff employee exhausted the seven-month leave allowed by her employer but was still unable to return to work. 218 F.3d at 935. Her employer had never notified her that her leave was designated as FMLA-qualifying leave, so she requested additional leave under FMLA. Id. The employer rejected her request for more time off and also denied her the opportunity to return part-time. Id.

Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 161 (2d Cir. 1999). The question was whether the FMLA notice sufficiently explained the employee's options, not whether it was timely issued. In Sarno, the plaintiff argued that his employer violated the act by terminating him without giving him notice that he was not entitled to more than the twelve weeks of leave provided by FMLA. Id. at 158. In compliance with the regulations, the employer had sent a letter within two days of the beginning of the medical leave, alerting the employee that the leave would be considered unpaid FMLA leave. Id. at 157. At the end of the twelve-week period, the employee could not return to work and was therefore terminated. The Second Circuit approved this outcome.

> Assuming arguendo that Sarno should have been given more explicit notice than was given . . . Sarno's right to reinstatement could not have been impeded or affected by the lack of notice because . . . that inability continued for some two months after the end of his 12-week FMLA leave period. Any lack of notice of the statutory 12-week limitation on FMLA leave could not rationally be found to have impeded Sarno's return to work.

Id. at 161-62.

Hypercom has directed the court's attention to two additional circuit decisions. These opinions discuss a different FMLA regulation, which addresses what should happen when employees who are ineligible for FMLA leave are absent. The regulation provides that "if the employer fails to advise the employee whether the employee is eligible [for family leave] prior to the date the requested leave is to commence, the employee will be deemed eligible." 29 C.F.R. § 825.110(d). The Seventh Circuit found the provision unreasonable. "The

regulation allows an employee to claim benefits to which she is not entitled as a matter of law or equity, thus conferring a windfall by extinguishing the employer's defense without any basis in legal principle." Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 582-83 (7th Cir. 2000). The Eleventh Circuit concurred. See Brungart v. BellSouth Telecommunications, Inc., 231 F.3d 791, 796-97 (11th Cir. 2000).

With respect to the particular regulation in issue here, the Sixth Circuit has taken the opposite tack. It holds that 29 C.F.R. § 825.208(c) "evinces a reasonable understanding of the FMLA, reflecting Congress's concern with providing ample notice to employees of their rights under the statute." Plant v. Morton International, Inc., 212 F.3d 929, 935 (6th Cir. 2000). The panel construed FMLA to impose minimum standards for medical leave, rather than specifying twelve weeks of federally protected leave. Id. The Plant court found the regulation consistent with a view of the statute as a floor that could permit employees to take more than twelve weeks of leave. Id. at 936.

Another court upholding the regulation framed the issue by asking whether the statute specifies when the twelve-week period of FMLA leave begins, and whether retroactive designation is permitted. Ritchie v. Grand Casinos of Mississippi, Inc., 49 F.Supp.2d 878 (S.D. Miss. 1999). Finding that the statute is silent on these points, the court held that 29 C.F.R. § 825.208 permissibly aimed to "fill in the gaps."

The Fourth Circuit has applied 29 C.F.R. § 825.208, but it has not been presented with a challenge to its validity. See Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 300-01 (4th Cir.

1998).

In response to Hypercom's use of the Brungart and Dormeyer opinions, Nolan argues that the regulation in issue in these cases is distinguishable. Section 825.110(d) conferred eligibility on ineligible employees, contradicting clear statutory language. By contrast, section 825.208(c) fills gaps left in the statute, he argues.

In urging the court to follow Cline and Plant, Nolan describes the infelicities of Defendant's position. If Defendant's view is correct, Nolan claims, "an employer, when confronted by an employee with a serious health condition, could decide that all other leave that he previously took during that year would now be counted against the twelve weeks." Response at 5. Nolan offers the hypothetical situation of a new parent who wishes to take FMLA leave following the birth of a child, but who has taken ten days of sick leave already that year. According to Nolan, the parent's post-birth leave could be reduced to ten weeks if the employer decided to redesignate the sick leave as FMLA leave.

Defendant rebuts by pointing out that leave for medical reasons may be designated as FMLA leave only if the employee suffers from a serious medical condition. Reply at 3. Thus, if an employee exhausts her sick leave with bouts of the flu, the days of absence could not be retroactively designated as FMLA leave because the serious medical condition requirement has not been satisfied. As long as the employee used up her two weeks of sick leave on trivial indispositions, she would be entitled to a full twelve-week FMLA leave. Of course, Defendant's position

does not help the new parent who has earlier taken leave on account of something serious.

Defendant presents its own hypothetical horror story: "an opportunistic employee could take advantage of the 'system' by utilizing weeks and weeks of accrued sick or vacation leave for an FMLA-qualifying medical condition, and then demand an additional 12 weeks of leave based on an employer's failure to provide a timely written FMLA notice." Reply at 3. This hypothetical assumes that an "opportunistic" employee would lay down a very good attendance record over a substantial period of time, stockpiling sick leave and vacation time. Then--and only in the face of a serious medical event--would this "opportunistic" employee seek to take more than twelve weeks off. Hypercom does not explain how this employee, who in other contexts would be lauded as "dedicated," should be deemed opportunistic for seeking to obtain more leave after earned sick leave and vacation time are exhausted. There is nothing inherently "opportunistic" in an employee's attempts to ensure that he has a job to return to after being sick or injured.

Pejorative language aside, Hypercom's example brings up an important point. The question is whether retroactive designation of FMLA leave will confound an employee's expectations about the amount of leave he will be afforded. If an employee knows he has accrued nine days of sick leave but anticipates being out for three and a half months, the employee must have some expectation of other accommodation from his employer. The question is whether the employer or the employee bears the burden of figuring out the employment consequences of a fourteen-week leave, and

when this calculation must be made. Undoubtedly it is desirable for both sides that employees understand the details of their employers' leave policies prospectively. This would prevent situations that smack of unfairness to employees. The regulation ensures clarity in any particular case, in that each employee gets twelve weeks of leave from the date of notice. But this rule does not speak to the reasonable expectations that FMLA gives employers and employees in general.

FMLA provides that twelve weeks of leave on account of a serious medical condition is a reasonable expectation. FMLA sets a floor. FMLA recognizes an employer's prerogative to count sick leave and vacation time as part of the federal leave entitlement, as long as the twelve-week entitlement is delivered. 29 U.S.C. § 2612(c)-(d). A baseline leave of twelve weeks requires employees and employers to communicate about leaves approaching that deadline or extending beyond it.

The burden of communication does not rest on the employer alone. There is no reason why employees should not be required to understand the extent of their guaranteed leave. There is a clear basis in the statute for requiring employees to confer with employers about their anticipated absences. See 29 U.S.C. § 2612(e). Employees have a duty to notify employers of foreseeable births or planned medical treatments. Id. Absent some extraordinary medical obstacle, not alleged here, there is no reason why employers and employees cannot at the time of notice or within a few days thereafter determine when available leave shall be exhausted. This contemplates responsibility by employees, if they are interested in securing their jobs, and by

employers[5]. But as the statute plainly reflects, employees are in a better position to anticipate the amount of time off they will need, and they are more motivated to ensure that their job will be protected while they are away. For if employees did not have a greater interest in ensuring a right to return to their jobs, than employers' interest in accepting them back, FMLA would have been unnecessary.

The regulation has the perverse effect of creating a game, such that employees gamble on the amount of leave they might obtain outside the twelve weeks provided by FMLA. There is no uniform expectation among employers and employees under such a system. The court concludes that the regulation upsets the statutory balance between employers' interests in having jobs filled by trained personnel, and employees' needs for medical leave. The regulation provides employees more leave that the substantive guarantees of the statute. This court joins with the Eighth, Second and Eleventh Circuits in holding that 29 C.F.R. § 825.208(c) is invalid. Accordingly, Hypercom was entitled to designate Nolan's leave as taken pursuant to FMLA retroactively. There is no dispute that, if the FMLA period began November 30, 1998, Nolan's return to work was outside the time protected by federal statute.

THEREFORE, IT IS ORDERED, granting Defendant's Motion for Summary Judgment (doc. #5). The clerk is ordered to enter

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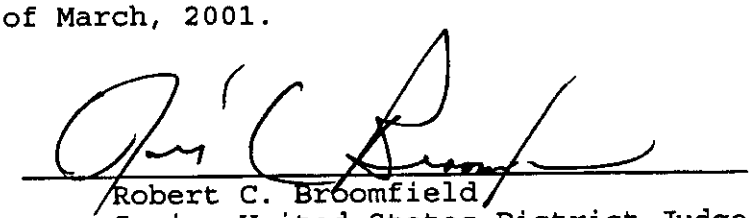
[5] While not an issue in this case, it seems only just that employers be held strictly responsible for the representations of their human resources personnel inasmuch as they are the natural source of inquiry by employees concerning leave issues.

Judgment for Defendant and to terminate the case.

DATED this 22 day of March, 2001.



Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record